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JALIL YUNUS

v.

PP

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HIGH COURT MALAYA, KANGAR
ZAMANI RAHIM JC
[CRIMINAL APPEAL NO: 42-04-2008]
13 AUGUST 2009

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Possession - Cannabis - Drugs allegedly found in a drawer in rear room of accused's house based on information given by accused - Information given by accused inadmissible under s. 27 Evidence Act 1950 - Prejudicial evidence admitted against accused - Prosecution witness not credible - Prima facie*
D *case not established - Dangerous Drugs Act 1952, s. 6*

EVIDENCE: *Information leading to fact discovered - Admissibility of statement - Whether written record of information supplied by accused under s. 27 Evidence Act 1950 is admissible - Whether such written*
E *record is substantive evidence - Whether information distinctly related to discovery of drugs - Drugs already discovered before information given - Information which does not lead to discovery of drugs inadmissible - Evidence Act 1950, s. 27*

EVIDENCE: *Witness - Credibility - Self-contradiction - Evidence given*
F *by prosecution witness inconsistent with witness's earlier police report - Whether a credible witness*

A police party led by C/Insp. Mior (SP4) had raided a house. The door was opened by the accused. SP4 gave evidence that when
G he questioned the accused "Adakah kamu menyimpan apa-apa barang salah", the accused replied "Saya ada simpan sedikit ganja (untuk guna sendiri) di laci belakang. Saya boleh tunjuk kepada encik." According to SP4, the accused then led SP4, SP5 and the other police officers to a plastic cabinet in the rear room of the
H house where he pulled the topmost drawer and showed SP4 a black plastic package containing ganja. The accused was arrested and taken to the police station where a report (P16) was lodged. In the report, SP4 wrote *inter alia*, that having administered the caution to the accused under s. 37A(1)(b) of the Dangerous
I Drugs Act 1952 ('DDA52'), SP4 asked the accused "Adakah kamu menyimpan apa-apa barang salah? to which the accused replied "Saya ada simpan sedikit ganja untuk guna sendiri dibilik

belakang di dalam laci. Saya boleh tunjuk pada encik." The accused was charged with possession of cannabis, an offence under s. 6 of the DDA52. The prosecution sought to prove the accused was in possession of ganja or cannabis by relying on the accused statement or information given to SP4 under s. 27 of the Evidence Act 1950 (the Act). The learned Deputy had intended to tender a written record (ID13) which he claimed to be information supplied by the accused under s. 27, but later withdrew it when the learned counsel for the accused objected. The accused appealed against his conviction and sentence.

Held (allowing the appeal):

(1) The words in P16 were inconsistent with SP4's testimony in court. It was a self-contradiction. They conveyed different meanings. The word 'belakang' in his testimony in court referred to 'laci'. While in P16, the word 'belakang' referred to the room. Only a contemporaneous record made by SP4 could resolve the contradictions. (para 20)

(2) The learned counsel's ground of objection of the admission of ID13 was misconceived. The learned Deputy should have admitted ID13 in evidence as corroborative evidence to corroborate the oral testimony of SP4 in court under s. 157 of the Act or for the purpose of refreshing memory under s. 159 of the Act. (para 22)

(3) Information given under s. 27 is not a matter that is required by law to be in writing so as to be governed by ss. 91 and 92 of the Act. The written record of an information given by the accused is not by itself substantive evidence. Neither can it substitute the oral evidence of the witness given in court. The written record of the information will only serve to enhance the credibility of the witness. (para 23)

(4) SP5's evidence that he heard the accused inform SP4 "Saya ada simpan sedikit ganja (untuk guna sendiri) dan saya simpan di dalam laci" was not s. 27 disclosure information as the information did not distinctly relate to the discovery of the ganja as the said ganja was already seen and discovered in the drawer when the information was alleged to have been uttered by the accused. Similarly the words "inilah ganja itu encik" were inadmissible under s. 27 as the ganja was already discovered by then. (para 24)

(5) The words "untuk guna sendiri" were inadmissible because the words did not relate to the discovery of the drugs. Further, the words meant the said ganja in small amount was for the accused's own consumption. This evidence was highly prejudicial to the accused. (para 26)

(6) The court had grave doubt about the credibility of SP4's and SP5's evidence in relation to information allegedly given by the accused under s. 27. Furthermore, prejudicial evidence had been admitted and had certainly influenced and reinforced the trial judge decision on the issue of possession, custody and control. The prosecution could not be said to have successfully made out a *prima facie* case of drugs possession by the accused. The defence should not have been called. (para 29)

Case(s) referred to:
Amathevelli P Ramasamy v. PP [2009] 3 CLJ 109 FC ***(refd)***
Kathavarayan Munisamy v. PP [2009] 1 CLJ 125 CA ***(refd)***
Krishnan Ramar v. PP [1987] 1 CLJ 28; [1987] CLJ (Rep) 145 SC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Hashim Hanafi [2003] 8 CLJ 555 HC ***(refd)***
PP v. Muhammad Nasir Shaharuddin & Anor [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408 HC ***(refd)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***
PP v. Paneeselvan & Ors [1995] 1 MLJ 106 ***(refd)***
PP v. Teo Eng Chan & Ors [1988] 1 CLJ 425; [1988] 2 CLJ (Rep) 793 HC ***(refd)***
Pulukuri Kotayya & Others v. Emperor, AIR (34) [1947] 67 ***(refd)***
Saludin Surif v. PP [1997] 3 CLJ 529 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 113
Dangerous Drugs Act 1952, ss. 6, 37A(1)(b), 39A(2)
Evidence Act 1950, ss. 24, 25, 26, 27, 91, 92, 157, 159

Other source(s) referred to:
Sarkar On The Law of Evidence, 12th edn, p 304

For the appellant - Rahamathullah Baharudeen; M/s Rahmat & Mashuri
For the respondent - Azman Abu Hassan DPP

Reported by Amutha Suppayah

JUDGMENT

Zamani Rahim JC:

[1] The accused was charged before the Sessions Court, Kangar with possession of cannabis, an offence under s. 6 of the Dangerous Drugs Act 1952, punishable under s. 39A(2) of the same Act. The charge reads as follows:

> Bahawa kamu pada 14.7.2007 jam lebih kurang 4.15 pagi disebuah rumah di alamat Lot 838, KM.5, Jalan Tok Kuning, di dalam Daerah Kangar, di dalam Negeri Perlis, telah ada dalam milikan kamu dadah berbahaya iaitu Cannabis seberat 198.10 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 6 Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

[2] After the trial, the accused was found guilty, convicted and sentenced to nine years imprisonment from date of arrest 14 July 2007 and ten strokes of whipping.

[3] Being dissatisfied with the conviction and sentence the accused appealed to this court.

[4] The prosecution case may be summarized as follows.

[5] On 14 July 2007, at about 4am, a police party led by C/Insp. Mior Abdul Khalil, SP4 raided a house at KM 5, Jalan Tok Kuning, Kangar. SP4 knocked the front door of the house. The door was opened by the accused. SP4 identified himself as a police officer by showing his authority card. SP4 searched the body of the accused and nothing incriminating was found.

[6] SP4 then struck a conversation with the accused outside the front door of the said house. In the conversation SP4 questioned the accused as follows:

> Adakah kamu menyimpan apa-apa barang salah.

[7] The accused replied:

> Saya ada simpan sedikit ganja (untuk guna sendiri) di laci belakang. Saya boleh tunjuk kepada encik.

[8] Thereafter the accused led SP4, D/SM Che Hassan, SP5 and D/L/Kpl. Hafiza to a plastic cabinet in the rear room of the said house. The accused then pulled the topmost drawer and showed a black plastic package to SP4. SP4 took the black plastic package, examined it and found it to contain as follows:

A i) a compressed slab suspected to be ganja partially wrapped in papers.

ii) a small unwrapped slab, and

B iii) two transparent plastic packets containing loose substance suspected to be ganja.

[9] At the time the exhibits were found, the accused appeared restless and informed SP4 "inilah ganja itu". The accused was arrested and the exhibits were seized. The accused and the C exhibits were taken to Jabatan Siasatan Jenayah, Narkotik, IPK Perlis where a report was lodged *vide* Kangar Rpt. 2923-2924/07, P16. The police report, P16 reads, *inter alia*:

> Dengan serta merta saya memberi kata-kata amaran di bawah D s. 37A(1)(b) Akta Dadah Berbahaya, 1952 iaitu "Adalah menjadi kewajipan saya memberi amaran kepada kamu, bahawa kamu tidak diwajibkan berkata-kata apa-apa jua atau menjawab apa-apa soalan, tetapi apa-apa juga yang kamu katakan samada sebagai jawapan kepada suatu soalan atau tidak, boleh diberi sebagai keterangan. Setelah dia mengaku faham amaran itu saya telah bertanya E "Adakah kamu menyimpan apa-apa barang salah? Dan dia menjawab "Saya ada simpan sedikit ganja untuk guna sendiri di bilik belakang di dalam laci. Saya boleh tunjuk pada encik" ... Dia kemudian membawa saya ke tempat tersebut iaitu di bilik belakang rumah itu dan membuka laci lalu menunjukkan kepada saya sambil F berkata "inilah ganja itu encik". Saya mengambil bungkusan plastik hitam itu dan menjumpai satu ketulan mampat disyaki ganja yang berbalut kertas, satu ketulan kecil disyaki dadah ganja (tidak berbalut) dan dua peket plastik cerah mengandungi bahan-bahan disyaki ganja.

G **[10]** The prosecution sought to prove the accused was in possession of ganja or cannabis by relying on the accused's statement or information given to SP4 under s. 27 of the Evidence Act 1950 (the Act), s. 27 provides:

> H When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of the information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

I **[11]** The learned defence counsel contended that the accused's statement amounted to a confession and therefore governed by ss. 24, 25 and 26 of the Act. The trial court should hold a *voire dire* to determine its voluntariness.

[12] I am of the considered view that the accused's statement in answer to SP4's question may be admitted in evidence as disclosure statement or information under s. 27 and no trial within trial need to be held.

[13] Section 27 is to be construed strictly – not oneword more of the information given by the accused need to be adduced in evidence except the words which are distinctly related to the discovery of fact. In *PP v. Muhammad Nasir Shaharuddin & Anor* [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408, Visu Sinnadurai J said:

> S. 27 is not a *carte blanche* provision to allow the admissibility of all statements made by an accused person. It has to be strictly construed.

[14] In the Supreme Court case of *Krishnan Ramar v. PP* [1987] 1 CLJ 28; [1987] CLJ (Rep) 145, Wan Suleiman SCJ said:

> Section 27 of the Evidence Act is not intended to let in a confession generally and not one word more of the information which the accused supplied should be given in evidence then is strictly to show how the fact which was discovered is connected with the accused so as in itself to be relevant fact against him.

[15] The author of "*Sarkar On The Law of Evidence*, 12th edn", in discussing s. 27 of Evidence Act said at p. 304 as follows:

> Statement made by the accused to police officers which are or may be provable under s. 27 should clearly and carefully recorded. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased ... No judge should allow one word more to be deposed to by the police than is absolutely necessary to show how the fact discovered is connected with the accused ...

[16] Section 27 is a lethal provision. It has no safeguards embodied in its provision unlike a cautioned statement recorded under s. 37A of the Dangerous Drugs Act 1952 or s. 113 of the Criminal Procedure Code. So the court being the last bastion of justice, must be vigilant in invoking s. 27, to ensure the police witnesses, especially those who questioned the accused and recovered the exhibits, to be reliable and credible. The provision of s. 27 is easily abused by overzealous police officers. I am not unmindful of the reminder made by Abdul Hamid Omar LP in *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 in the following words.

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> ... we are firmly of the view that in invoking s. 27, the courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of this section, which is so vulnerable to abuse.

B **[17]** Now let us evaluate the evidence adduced by the prosecution relating to s. 27 disclosure statement or information. SP4 raided the accused's house. He knocked on the front door. The accused opened the door. He was asked to come out from the house, which he did. His body was searched but nothing incriminating was found. The accused was invited to sit on a chair C outside the front door. Again SP4 identified himself as a police officer. He questioned the accused:

> Adakah kamu menyimpan apa-apa barang salah

D **[18]** The accused remained silent for a while. He then replied:

> Saya ada menyimpan sedikit ganja (untuk guna sendiri) dilaci belakang. Saya boleh tunjukkan kepada encik.

[19] Having given the information, the accused, SP4, SP5 and E D/L/Kpl. Hafiza entered the house, went to the rear room, past the kitchen area. There, the accused led SP4 to a plastic cabinet where he pulled the uppermost drawer. Once opened, the accused showed a black plastic package in the said drawer to SP4 and at the same time, the accused said "inilah ganja itu, encik". SP4 took F the said package, untied its knot and found in it, a compressed slab partially wrapped in papers, a small unwrapped slab and two plastic packets containing loose substance suspected to be ganja.

[20] After the suspected ganja were found, SP4 proceeded to G Kangar Police Station where a police report, P16 was lodged. In the report, P16 SP4 wrote *inter alia*, having administered the caution to the accused under s. 37A(1)(b) of the Dangerous Drugs Act 1952, SP4 asked the accused "Adakah kamu menyimpan apa-apa barang salah?. The accused was said to reply H *"Saya ada simpan sedikit ganja untuk guna sendiri dibilik belakang di dalam laci. Saya boleh tunjuk pada encik."* It is clear that the words in italics are certainly inconsistent with his testimony in court. It is self-contradiction. They conveyed different meanings. The word 'belakang' in his testimony in court refers to 'laci'. While in his I report P16, the word 'belakang' refers to the room. Only a contemporaneous record made by SP4 may resolve the contradictions.

[21] The notes of proceeding showed that the learned Deputy intended to tender a written record which he claimed (on my query) to be information supplied by the accused under s. 27, though the record also contained the caution under the Dangerous Drugs Act. This do not detract the admissibility of the statement or information under s. 27 contained in the same record: see *Kathavarayan Munisamy v. PP* [2009] 1 CLJ 125. The learned counsel strongly objected to the admission of the said written record because, according to him, s. 27 was not complied with, as no date, time and place were recorded. The learned counsel went on to contend that an incriminating statement when reduced into writing, no oral evidence should be allowed to be given to add or vary the said record. The counsel cited no authority. Presumably the learned counsel had ss. 91 and 92 of the Evidence Act in mind. At the request of the learned Deputy, the record was marked as ID13, subject for further argument. On the date fixed for argument, the learned Deputy withdrew his intention to adduce ID13 as exhibit (see p. 39 of appeal record).

[22] The learned Deputy did not state the ground upon which he wanted to have ID13 admitted. The learned counsel's ground of objection of the admission of ID13 was misconceived. The learned Deputy should have admitted ID13 in evidence as corroborative evidence to corroborate the oral testimony of SP4 in court under s. 157 of the Act or for the purpose of refreshing memory under s. 159 of the Act. The learned counsel's objection should be grounded, if any, on the non-compliance of s. 157 of the Act: see *PP v. Paneeselvan & Ors* [1995] 1 MLJ 106 and *PP v. Teo Eng Chan* [1988] 1 CLJ 425; [1988] 2 CLJ (Rep) 793. At this juncture I also wish to refer to the Federal Court case of *Amathevelli P. Ramasamy v. PP* [2009] 3 CLJ 109 where Arifin Zakaria CJ (Malaya) made reference to the judgment of Augustine Paul J (as the then was) in *PP v. Hashim Hanafi* [2003] 8 CLJ 555 as follows.

> Information given under s. 27 is not a matter that is required by law to be in writing so as to be governed by ss. 91 and 92 of the Act. Therefore the information must be proved by oral evidence pursuant to s. 60(b) of the Act. Thus a written record of the information given by the accused will not by itself be substantive evidence of its contents and it is what the witness deposes in court as having been said by the accused that will be evidence (see *Bhagirath*). Where the information is contained in a police diary it can only be used for the purpose of refreshing

A memory, (see *Public Prosecutor v. Er Ah Kiat* [1965] 1 LNS 136; [1966] 1 MLJ 9). Where it is contained in any other document it can, at the highest, serve only as evidence of corroboration. It is on this basis that a report prepared by a chemist pertaining to his analysis of drugs cannot be tendered as substantive evidence
B of its contents but only as corroboration of this oral evidence in court under s. 157 of the Act (see *Saw Thean Teik v. R* [1952] 1 LNS 121; *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170). The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient
C and satisfactory and credible (see *DPP v. Hester* [1972] 3 All ER 1056). Its role is to confirm other evidence in the sense that it renders that other evidence more probable (see *Doney v. R* [1990] 171 CLR 207; *DPP v. Kilbourne* [1973] AC 729). It cannot therefore amount to that other evidence itself. Thus the record of an information will only enhance the credibility of the witness and
D the absence of it cannot render the oral evidence of it inadmissible; nor can it be substitute for the evidence that it is meant to corroborate.

[23] As stated at the beginning of the above passage,
E "information given under s. 27 is not a matter that is required by law to be in writing do as to be governed by ss. 91 and 92 of the Act". Thus, the learned counsel's argument is not sustainable in law. The written record of an information given by the accused is not by itself a substantive evidence. Neither can it substitute
F the oral evidence of the witness given in court. The written record of the information will only serve to enhance the credibility of the witness. In this case, the learned Deputy had thrown away the opportunity to strengthen SP4's credibility as he withdrew the written record, ID13 from being put in evidence. The trial court
G and this court are deprived from considering whether ID13 was corroborative of SP4's evidence as regard to the information given by the accused. It is crucial that the actual words given by the accused must be recorded somewhere at the time the statement or information were given. It must be recorded contemporaneously,
H read over to the accused and his signature obtained as an acknowledgment of what he says.

[24] Be that as it may, another police officer, SP5 was called to testify, obviously to lend credence to the evidence of SP4.
I According to SP5, the accused, SP4, D/L/Kpl. Hafiza and himself went into the house. They went to the rear. There, the accused

walked up to the plastic cabinet and pulled the top most drawer. Immediately, SP5 said that the accused informed SP4 "Saya ada simpan sedikit ganja untuk guna sendiri dan saya simpan di dalam laci". SP4 took possession of a plastic package and upon examination, it was found to contain the exhibits as stated earlier. SP5 had made no mention that the accused ever uttered "inilah ganja itu encik". According to SP5, he heard correctly every word of conversation between SP4 and the accused. To quote his exact words in evidence "saya dengar betul setiap butir-butir perbualan antara Insp. Mior (ie, SP4 dan OKT" (at p. 52 of appeal record). And also in reply to the learned counsel suggestion in cross examination, SP5 said he could remember what was spoken between SP4 and the accused. Therefore, SP5 could not have been mistaken or forgotten as to the exact place and the exact words uttered by the accused. As to the place where the information was given, SP5 said the accused gave the information after the accused opened the top most drawer of the plastic cabinet. Whilst SP4 said the place was outside the front door which was quite a distance from the plastic cabinet at the rear of the room (see sketch plan). As regard the information itself, SP5's evidence had seriously contradicted with the accused's information as testified by SP4. There was also no evidence forthcoming from SP5 that SP4 questioned the accused in the following words "Adakah kamu menyimpan apa-apa barang salah?. At any rate, SP5's evidence that he heard the accused inform SP4 "Saya ada simpan sedikit ganja (untuk guna sendiri) dan saya simpan didalam laci" is not s. 27 disclosure information as the information do not distinctly relate to the discovery of the ganja as the said ganja was already seen and discovered in the drawer when the information was alleged to have been uttered by the accused. Similarly the words "inilah ganja itu encik" are inadmissible under s. 27 as the ganja was already discovered by then.

[25] Another disturbing feature of this case is an unedited admission of the information given by the accused by the trial judge. Sir John Beaumont in a Privy Council case from India *Pulukuri Kotayya & Others v. Emperor*, AIR (34) [1947], 67, a *locus classicus* case on s. 27 said:

> Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house: does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is

A proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

B **[26]** In this case, the words in brackets "untuk guna sendiri" stand on the same footing and similarly inadmissible as with the words "with which I stabbed A" in *Pulukuri Kotayya & Others*'s case, *supra* because firstly, the words "untuk guna sendiri" do not relate to the discovery of the drugs in the drawer of the plastic C cabinet at the rear of the accused's house. Secondly, the words "untuk guna sendiri" means the said ganja in small amount was for the accused's own consumption. This evidence is highly prejudicial against the accused. In the Court of Appeal case of *Saludin Surif v. PP* [1997] 3 CLJ 529, Shaik Daud Ismail JCA said:

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> Apart from this, the appeal records show that the learned Judge admitted evidence highly prejudicial to the appellant through the testimony of SP12 was allowed to adduce evidence that he had frequently visited the premises in order to smoke ganja sometimes E with the late Mohd. Musa and sometimes with the appellant and that the appellant had smoked ganja in the premises before. The testimony of SP12 that just before the police raided the premises he had smoked ganja in the premises which ganja was allegedly provided by the appellant. The learned Judge admitted all these simply on the ground that there was no challenge of this in F cross-examination and that there was no reason for him to reject such evidence. With respect, we hold that the learned Judge erred in law on this issue, as it is trite law that inadmissible evidence remains inadmissible whether challenged or not. We hold that all the testimony of SP12 in connection with the appellant, are highly prejudicial and ought to be excluded. The general rule is that G evidence showing the accused had committed any other offence other than those charged, or has a disposition to commit the kind of offence charged, is inadmissible for the purpose of showing that he had committed or likely to have committed the offence with which he is charged. Having admitted and considered the highly H prejudicial evidence, it is obvious that this had influenced the learned judge to hold that appellant had exclusive possession, custody or under his control the offending drug.

[27] Having admitted the highly prejudicial evidence, I have no doubt that the learned trial judge was influenced by the evidence I to reinforce that the accused was in possession, custody or control of the ganja, the subject matter of the charge.

[28] For completeness of my judgment, the prosecution's case against the accused was solely anchored on the information allegedly supplied by the accused under s. 27. It was not based on the exclusivity of occupation of the house by the accused in which the ganja was found. "Exclusivity of possession is an essential ingredient to be established by the prosecution before defence can be called, even on a *prima facie* standard of proof, not only on a charge of trafficking but also on possession "per Vincent Ng J in *PP v. Ong Cheng Heong* [1998] 4 CLJ 209.

[29] Having conducted maximum evaluation of the prosecution's evidence at the close of its case as set out in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, I have grave doubts about the credibility of SP4 and SP5's evidence in relation to information allegedly given by the accused under s. 27. Furthermore, prejudicial evidence had been admitted and had certainly influenced and reinforced the trial judge's decision on the issue of possession, custody and control. The prosecution cannot be said to have successfully made out a *prima facie* case of drugs possession by the accused. I am of the considered view that the accused's defence ought not to have been called. In the light of my findings, I do not propose to deal with the accused's defence. Accordingly I allow the appeal, quash the order of conviction, and set aside the sentence. The accused is hereby acquitted and discharged.